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10 IN THE SUPERIOR COURT
11 FOR THE
12 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

13 ROBERT A. BISOM,

14 Plaintiff,

15 vs.

16 COMMONWEALTH OF THE
17 NORTHERN MARIANA
18 ISLANDS, LEO L. LAMOTTE,
19 CNMI Public Auditor, in his official
20 capacity, ROBERT D.
21 BRADSHAW, formerly appointed
22 Temporary Public Auditor, in his
23 individual capacity, SCOTT
24 KHENG SHANG TAN, formerly
25 CNMI Public Auditor, in his
26 individual capacity,

27 Defendants.

CIVIL ACTION NO. 96-1320

REPLY TO OPPOSITION TO
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Date: September 8, 1999

Time: 2:30 p.m.

Judge: Hon. Alexandro C. Castro

28 Plaintiff hereby replies to Defendants' opposition to Plaintiff's motion for partial
summary judgment.

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Exhibit
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**I. THERE IS NO DISPUTE CONCERNING THE ESSENTIAL FACTS
AND THIS CASE IS RIPE FOR PARTIAL SUMMARY JUDGMENT.**

In their "Response to Plaintiff's Motion for Partial Summary Judgment," Civil Action No. 96-1320, Aug. 30, 1999 ("Defendants' Response"), Defendants do not contest any of the facts set forth in Plaintiff's Motion and accompanying Affidavit in Support. It is uncontested that Plaintiff was not provided any pre-termination of employment hearing or any post-termination hearing. Because these facts are not disputed, this case is ripe for partial summary judgment as a matter of law.

It is important to keep in mind the narrow scope of this motion. It seeks a determination of liability (damages being reserved for trial) on only three issues: (1) that Plaintiff was denied due process when Defendants Bradshaw and the Commonwealth failed to provide him any hearing either before or after he was terminated (a property interest claim); (2) that Plaintiff was denied due process when Defendants Bradshaw and the Commonwealth failed to provide him any hearing either before or after publicly attacking Plaintiff's professional competence, ethics, and reputation (a liberty interest claim); and, (3) that Plaintiff may maintain a cause of action against the Commonwealth for denial of his due process rights guaranteed under Article I, Section 5 of the Commonwealth Constitution.

None of the facts asserted by Plaintiff going to his property interest claim or his liberty interest claim were effectively refuted by Defendants in their Response to Plaintiff's Motion. No affidavit or declaration of any kind was attached. This is a default on the part of Defendants and all factual assertions by Plaintiff must therefore be taken as true. Com.R.Civ.P. 56(e).

In a motion for summary judgment, Defendants have a clear obligation to either refute the factual allegations made by Plaintiff, or set forth additional facts demonstrating the existence of a genuine issue of material fact. This must be done by way of an affidavit or lawful declaration filed with the Court. Com.R.Civ.P. 56(e). No other form of factual denial or assertion of fact satisfies Rule 56(e), and it is not sufficient for opposing counsel to attempt to refute facts from within the body of the opposition memorandum.

Once a movant for summary judgment has shown that no genuine issue of material

fact exists, the burden shifts to the opponent to show that such an issue does exist. . . . Pursuant to Com.R.Civ.P. 56(e), the opponent, by affidavit or otherwise, must set forth specific facts showing . . . a genuine issue for trial. General denials or conclusory statements are insufficient.

Riley v. Public School System, 4 N.M.I. 85, 89 (1994). *See also*, Aldan-Pierce v. Mafnas, 3 CR 326, 333 (D.NMI App. Div. 1988).

Defendants' duties to effectively oppose a motion for summary judgment are spelled out even more clearly in Borja v. Rangamar, et al., 3 CR 890 (Com.Sup.Ct. 1989):

To create a question of fact, the adverse party responding to a properly made and supported summary judgment motion must set forth specific facts showing that there is a genuine issue for trial. In determining whether a genuine issue of fact exists, the court can only consider evidence which would be admissible and have probative force at trial.

It is a general rule of summary judgment procedure that denying the allegations of affidavits supporting a motion for summary judgment does not, ipso facto, create a genuine issue of material fact. Mere denials unaccompanied by statements of any facts which would be admissible in evidence at hearing, are not sufficient to raise a genuine issue of fact.

Id., 3 CR at 897 (*citations omitted*).

No admissible evidence was submitted by Defendants. Accordingly, in the present posture of this case, this Court must take as true the facts that Plaintiff was terminated from his employment contract without cause, in bad faith, for an improper reason and purpose, and without any pre- or post-termination hearing. *See* "Affidavit of Plaintiff in Support of Partial Summary Judgment," Civil Action No. 96-1320, August 13, 1999. As demonstrated below, this deprived Plaintiff of both his liberty and property rights in violation of his constitutionally-guaranteed right to due process.

II. DEFENDANTS' MISCONSTRUE THE DUTY TO PROVIDE A PRE-DEPRIVATION HEARING AND IMPROPERLY ATTEMPT TO SHIFT RESPONSIBILITY FOR CONDUCTING SUCH HEARING TO PLAINTIFF.

Defendants argue that Plaintiff is not entitled to summary judgment now because, ". . . plaintiff has made no request for hearing nor has he made any appeal to the Civil Service Commission. . . . It therefore is a question for the finder of fact as to whether plaintiff was denied

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1 a hearing where he requested none." This refrain is repeated several times in attempt to manufacture
2 out of thin air a question of fact in desperate attempt to avoid this summary judgment. See
3 Defendants' Response, pp. 3, 6, 8, and 9. Defendants cite no authority for this proposition
4 whatsoever. No authority is cited because there is none. The law does not support the
5 unprecedented idea that it is the duty of the person deprived of his rights to force the government to
6 provide him a hearing to determine whether the government's acts are illegal, wrongful,
7 unauthorized by law, arbitrary, or capricious. The proposition is abhorrent to principles of due
8 process and would turn the entire body of constitutional due process law on its head going back as
9 far as the Magna Carta. It must be rejected by this Court.

10 Defendants' argument plainly misconstrues the unambiguous language of the Constitution,
11 does not comport with decisional law setting forth due process protections required in an
12 employment setting, is plainly at odds with the Civil Service Commission's "Personnel Service
13 System Rules and Regulations," and just as plainly is at odds with the duties of the Office of the
14 Public Auditor under the Commonwealth Administrative Procedures Act ("APA"), 1 CMC §§ 9101 -
15 9115. As demonstrated below, even in the absence of a clear rule of law that plaintiff was entitled
16 to the protections of the Civil Service Act and the Civil Service Commission's administrative
17 procedures, Defendants cannot escape liability for denial of due process.

18 **A. Constitutional law clearly holds that the government bears the responsibility to**
19 **provide a hearing before depriving Plaintiff of his rights to liberty, property, his reputation,**
20 **or his employment.** Article I, Section 5 of the Commonwealth Constitution provides that "No
21 person shall be deprived of life, liberty or property without due process of law." This clear language
22 means that Plaintiff cannot be deprived of his liberty or property interests in employment unless and
23 until he is provided a due process hearing. The undisputed facts here are that no hearing was given
24 and no hearing was ever offered. It is frivolous to suggest that the government and its officials may
25 deprive Plaintiff of his rights while placing the burden on Plaintiff to structure his own due process
26 hearing, including its procedural and substantive law, create his own forum in which such a hearing
27 would take place, and initiate his own demand for such a hearing.

28 Article I, Section 5 of the Commonwealth Constitution affords the same protection as the

1 Due Process Clause of the 14th Amendment to the United States Constitution. Office of the Attorney
 2 General v. Rivera, 3 N.M.I. 436, 445 n. 3 (1993). In the setting of employment terminations, the
 3 process that is due has been construed by the U.S. Supreme Court many times.^{1/}

4 **1. Plaintiff's liberty interest in employment.** The United States Supreme Court has held
 5 that an individual's interest in employment in "the common occupations of life" is a protected liberty
 6 interest, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 2707, 33 L.Ed.2d
 7 548 (1972), and held that an individual's interest in their professional reputation is also a protected
 8 liberty interest:

9 Where a person's good name, reputation, honor, or integrity is at stake because of
 10 what the government is doing to him, notice and an opportunity to be heard are
 essential.

11 *Roth, supra*, quoting from Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27
 12 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti-
 13 Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States
 14 v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S.
 15 331, 352, 75 S.Ct. 790, 801, 99 L.Ed 1129, and citing Cafeteria & Restaurant Workers v. McElroy,
 16 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. "In such a case, due process would accord
 17 an opportunity to refute the charge before [the government officials who made them]." *Roth*, 92 S.Ct.
 18 at 2707.

19 **2. Plaintiff's property interest in employment.** Furthermore, the Supreme Court has
 20 recognized that a person has constitutionally-protected property interest in not being dismissed from
 21 public employment without opportunity for a hearing:

22 Similarly, in the area of public employment, the Court has held that a public college
 23 professor dismissed from an office held under tenure provisions . . . and college
 24 professors and staff members dismissed during the terms of their contracts . . . have
 25 interests in continued employment that are safeguarded by due process. Only last
 year, the Court held that this principle proscribing summary dismissal from public
 employment without hearing or inquiry required by due process also applied to a

26
 27 ^{1/} See discussion of applicability of U.S. decisional law at p. 11 of Plaintiff's "Memorandum
 28 of Points and Authorities in Support of Motion for Partial Summary Judgment," Civil Action 96-
 1320, Aug. 5, 1999.

1 teacher recently hired without tenure or a formal contract, but nonetheless with a
2 clearly implied promise of continued employment.

3 *Roth*, 92 S.Ct. at 2709 (*internal citations and quotations omitted*).

4 **3. Due process is required *before* an employee is terminated from employment.** Finally,
5 *Roth* clearly establishes that it is the government's duty to provide notice of and an opportunity to
6 be heard in such a hearing:

7 Before a person is deprived of a protected interest, he must be afforded opportunity
8 for some kind of hearing except in extraordinary circumstances where some valid
9 governmental interest is at state that justifies postponing the hearing until after the
event.

10 *Roth, supra*, 92 S.Ct. at 2705 n. 7. It is not the duty of Plaintiff to demand a hearing in the absence
11 of an offer for one from the government.

12 It is important to notice that in each expression of the due process principle, the Court
13 emphasizes the point that a hearing is required *before a person is deprived*. This rule is clear and
14 unambiguous. "When protected interests are implicated, the right to some kind of *prior* hearing is
15 paramount." *Id.*, 92 S.Ct. at 2705 (*emphasis supplied*). See also Wolff v. McDonnell, 418 U.S. 539,
16 94 S.Ct. 2963, 2975, 41 L.Ed. 2d 935 (1974) (collecting cases) ("The Court has consistently held that
17 some kind of hearing is required *at some time before a person is finally deprived* of his property
18 interests.") (*emphasis supplied*); Bushe v. Burkee, 649 F.2d 509, 515 (7th Cir. 1981) ("due process
19 requires that a person receive notice of charges brought against him so that he may understand why
20 he is being investigated and have an opportunity to prepare a response.").

21 Since the government failed to offer or provide any pre-deprivation hearing, it cannot be
22 heard now to complain. As the Third Circuit Court held in Abraham v. Pekarski, 728 F.2d 167 (3rd
23 Cir. 1984),

24 The defendants urge somewhat half-heartedly that no evidence adduced at trial
25 supported Abraham's due process claim. That contention is frivolous. It was
26 conceded in the trial court that Abraham was discharged without any hearing
27 whatsoever. If Abraham had a property interest in not being discharged except for
28 good cause, the conceded fact that he was discharged without a hearing is alone
enough to support a verdict in his favor. . . . A post-termination judicial finding
respecting an employment dismissal is not a substitute for a pre-termination due
process hearing.

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1 *Id.*, 728 F.2d at 170.

2 **4. Commonwealth Supreme Court precedent supports Plaintiff's position.** The due
3 process principles stated in the cases above have all been recognized in different, non-employment
4 settings by our Commonwealth Courts. They have been expressed as follows:

5 In an administrative proceeding where a person's life, liberty, or property are at stake,
6 Article I, Section 5 of the Commonwealth Constitution requires, at a minimum, that
7 the person be accorded meaningful notice and a meaningful opportunity to a hearing,
appropriate to the nature of the case.

8 Office of the Attorney General v. Paran, 4 N.M.I. 191, 194 (1994) (*quoting from* Office of the
9 Attorney General v. Rivera, 3 N.M.I. 436, 445 (1993), *in turn quoting from*, Office of the Attorney
10 General v. Deala, 3 N.M.I. 110, 116 (1992)).

11 In addition, it has been held that ". . . a fundamental requirement of due process is the
12 opportunity to be heard at a meaningful time in a meaningful manner." In re Hafadai Beach Hotel
13 Extension, 4 N.M.I. 37, 45 (1993) (*quoting from* Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct.
14 893, 902, 47 L.2d.2d 18, 32 (1976).

15 **5. It is improper to attempt to shift the burden to Plaintiff.** It is improper to attempt to
16 blame Plaintiff for Defendants' failure to provide any due process whatsoever. *See* Defendant's
17 Response, p. 9. The suggestion that Defendants have no duty to provide notice, opportunity to be
18 heard, or a meaningful hearing unless Plaintiff independently structures and demands such a hearing
19 is incorrect as a matter of law. It also misses one critical point: Plaintiff *has* found the only avenue
20 available to him for a hearing to redress the denials of equal protection and denial of due process
21 visited upon him by Defendants: this law suit.

22 **B. The Commonwealth Civil Service Commission's administrative rules clearly**
23 **required the government to notify Plaintiff of his right to appeal his dismissal.** The
24 Commonwealth Civil Service Commission has set forth the procedural due process requirements for
25 terminating an employee in the "Personnel Service System Rules and Regulations" ("Personnel
26 Rules") (the pertinent portions of these rules are attached hereto as EXHIBIT 1). Termination of
27 employment is defined as a "separation" from employment undertaken as an "adverse action" under
28 the Personnel Rules at Section III.D2. On the merits, the Rules require that "An action against an

1 employee may not be taken under this part except for such cause as will promote the efficiency of
 2 the service." Personnel Rules, § III.D2, C. ^{2/}

3 The procedure for terminating a public employee are set forth in Section III.D2, M., entitled
 4 "Procedure for taking adverse actions." See EXHIBIT 1. Section III.D2, M., sets forth the procedural
 5 steps required to ensure the employee's right to appeal a termination under 1 CMC § 8134(a) is
 6 ensured. They are also a form of codification of the employee's constitutional due process rights
 7 discussed above. These procedural steps do not require extensive discussion. It is enough to note
 8 that the employee must be given advance notice of termination, Section III.D2, M., (1), the employee
 9 must be given the right to answer personally or in writing the allegations made against him, Section
 10 III.D2, M., (3), the employing agency must 'consider' the employee's answer, Section III.D2, M.,
 11 (4), prior to actual termination of employment, management must give the employee a written
 12 decision outlining the reasons for termination and setting forth which of the reasons in the advance
 13 notice were found to have been sustained, Section III.D2, M., (6), and subsection (7) unambiguously
 14 provides "*The decision must tell the employee of appeal rights,*" Section III.D2, M., (7) (*emphasis*
 15 *added*). Once again, it is undisputed as a matter of fact, that these mandatory procedures were not
 16 followed in this case.

17 **C. The Commonwealth Administrative Procedures Act clearly provides that the agency**
 18 **was required to provide a hearing before depriving Plaintiff of his employment.** Clearly the
 19 act of terminating Plaintiff from his employment was "agency action" as defined by the
 20 Commonwealth APA. 1 CMC § 9101(c). Accordingly, the act of terminating Plaintiff is now subject
 21 to judicial review for compliance with the APA. Camacho v. Northern Marianas Retirement Fund,
 22 1 N.M.I. 362, 366 (1990); In re Dolores San Nicolas, 1 N.M.I. 329, 334 (1990).

23 Under the Commonwealth APA, the critical point of departure is whether a person is subject
 24 to a "sanction" as defined at 1 CMC § 9101(o). Under the relevant portion of § 9101(o), a sanction
 25 is any act of an agency that is a (1) prohibition, requirement, limitation, or other condition affecting
 26

27 ^{2/} Plaintiff contends in his Fifth and Eighth Claims that he was wrongfully terminated in
 28 violation of the standard stated in Personnel Rules Section III.D2.C, above.

EXHIBIT
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1 the freedom of a person; (2) withholding of relief where adjudication is required by law; (3)
2 destruction, taking, seizure, or withholding of property; or (7) taking other compulsory or restrictive
3 action. *Id.* Once an agency of the government determines it will take action that will impose or
4 otherwise work a sanction upon any person, the agency is required to comply with the administrative
5 adjudication procedures set forth at 1 CMC § 9108.

6 It is clear here that the act of terminating Plaintiff from his employment before the expiration
7 of his contract was a "sanction" as defined by the Commonwealth APA. Under established
8 precedent, it affected plaintiff's liberty and therefore his "freedom." *See Roth, cases cited and*
9 *discussion supra, Section II. A.* Termination without a hearing also withheld relief where
10 adjudication was clearly required by constitutional law, clearly affected a taking of a property interest
11 possessed by Plaintiff, and clearly was a compulsory action affecting plaintiff's personal rights as
12 these are defined in the APA. Accordingly, Defendants were obligated by the APA to provide
13 Plaintiff with an administrative hearing.

14 1 CMC § 9108(a), which sets forth the general requirement for an administrative hearing,
15 provides in relevant part that, "This section applies in every adjudication in which a sanction may
16 be imposed . . . unless an agency proceeding therefor is required by law to be preceded by notice and
17 opportunity to be heard. In an adjudication under this section, all parties shall be afforded an
18 opportunity for a hearing after reasonable notice." Furthermore, it is clearly established law that in
19 an employment termination the Commonwealth Administrative Procedures Act requires "the
20 proponent of an order or decision" (i.e., the government) to bear the burden of proof and the burden
21 of going forward with the evidence against the employee. *In re San Nicolas, supra*, 1 N.M.I. at 335-
22 337 (1990), *citing* 1 CMC § 9109(I).

23 It is thus clear that Defendants failed to comply with the Commonwealth APA when they
24 took adverse action terminating Plaintiff. The APA puts every agency of the government on notice
25 of the duty to provide hearings before imposing a sanction, and provides a structure for such
26 hearings. Even if the Public Auditor was not aware that Plaintiff was entitled to the specific
27 procedures of the Civil Service Commission, both Defendants Bradshaw and the Commonwealth
28 had to be aware that the Commonwealth APA provided Plaintiff with a right to some kind of

1 hearing. It is incredible and incorrect to suggest, as Defendants attempt to do, that Plaintiff had no
 2 right to a hearing at all unless he demanded one. Constitutional principles gave him a due process
 3 right and the APA codified those principles. Neither Defendant Bradshaw nor the Commonwealth
 4 had any right to ignore them.

6 III. THE GOVERNMENT'S RELIANCE ON *SHEARER* IS MISPLACED.

8 Defendants argue that Plaintiff has artfully pleaded his case to allege constitutional violations
 9 rather than a tort claim for defamation, *see* Defendants' Response, p. 4. Defendants rely on United
 10 States v. Shearer, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) in an effort to shoe-horn a
 11 completely unrelated concept into this case. Further, as demonstrated below, Defendants' reliance
 12 on *Shearer* is misplaced because the case is thoroughly disreputable and not precedent at all.

13 Defendants fail to advise the court that *Shearer* was a mere plurality opinion, that no majority
 14 of justices could agree with the portion of the opinion upon which Defendants' rely, that it is a highly
 15 controversial opinion that has caused a split of authority among the various federal circuits, that this
 16 split of authority has gone unresolved for the past 19 years since *Shearer* was announced, that its true
 17 holding is limited to circumstances where both the perpetrator of the tort and the victim are currently
 18 serving members of the U.S. military subject to a special doctrine of law applicable only to members
 19 of the military, and that the Ninth Circuit Court has resounding rejected the rationale of *Shearer*
 20 several times. *See discussion of Shearer and rejection of Part IIA by Ninth Circuit in Senger v.*
 21 United States, 103 F.3d 1437, 1441 (9th Cir. 1996); Kearney v. United States, 815 F.2d 535, 536-537
 22 (9th Cir. 1987); Morrill v. United States, 821 F.2d 142 (9th Cir. 1987); and, Bennett v. United States,
 23 803 F.2d 1502, 1503 (9th Cir. 1986). Because it is not a majority opinion, *Shearer* is not precedent
 24 and is entitled to only so much weight as persuasive authority as a court may wish to give it. In the
 25 Ninth Circuit, defendants fail to point out, *Shearer* is not good law at all. It should be given no sway
 26 as authority in the Commonwealth either, especially in this case.

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1 **IV. THE GRAVAMEN OF PLAINTIFF'S FOURTH CLAIM AND CAUSE**
 2 **OF ACTION ARE CONSTITUTIONAL VIOLATIONS.**

3 Contrary to Defendants' suggestion, Plaintiff's Complaint is not a defamation tort dressed
 4 up in constitutional wolves clothing to hide its true intent. *See* Defendants Response, pp. 4-6. The
 5 gravamen of Plaintiff's action is an action for denial of equal protection and due process. Plaintiff
 6 seeks redress for denial of his constitutional rights. The complaint sounds in constitutional law and
 7 not in common law tort. Beyond the clear manner in which the Complaint is drafted, this can also
 8 be seen in part by the fact that while a tort claim for defamation might have been lodged against
 9 Defendant Bradshaw in his individual capacity, and he is sued in other counts in his individual
 10 capacity, no such claim was stated.

11 It is disingenuous of defendants to "agree" with Plaintiff that "fundamental fairness requires
 12 that an individual be permitted to defend himself publicly against official charges, however informal,
 13 which threaten to stain his personal or professional future," *see* Defendants' "Response to Plaintiff's
 14 Motion for Partial Summary Judgment," p. 8, while at the same time argue that Plaintiff can
 15 vindicate such rights only through a tort action. There is no common law tort action that provides
 16 redress or vindication of these interests. The absence of "fundamental fairness" is redressed through
 17 constitutional causes of action where the government has previously denied due process.

18 Plaintiff's Fourth Claim clearly seeks redress for violation of his constitutional rights,
 19 including the failure to provide an opportunity to protect his liberty interest in his professional
 20 reputation, his liberty interest and right to work in the common occupations, and his property interest
 21 in his continued employment under contract with the government. As a matter of clearly established
 22 law these interests are protected by the due process clause. *See discussion Board of Regents of State*
 23 *Colleges v. Roth supra*, p. 3 (citing cases).

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V. **THE COMMONWEALTH HAS WAIVED SOVEREIGN IMMUNITY FROM SUIT FOR ALL CIVIL ACTIONS ARISING OUT OF ANY LAW OF THE CNMI, INCLUDING THE COMMONWEALTH CONSTITUTION, AND THIS COURT HAS EXCLUSIVE JURISDICTION OVER THEM.**

7 CMC § 2251, entitled “Other Actions Against the Commonwealth Government,” is, in relevant part, as follows:

Except as otherwise provided [in the Government Liability Act applicable only to torts], actions upon the following claims may be brought against the Commonwealth Government in the Commonwealth Trial Court which shall have exclusive original jurisdiction thereof:

- ...
(b) Any other civil action or claim against the Commonwealth Government founded upon any law of this jurisdiction . . .

Id.

This statute is a waiver of sovereign immunity by the Government of the Commonwealth for the actions specified. Section 2251 is a clear and unambiguous waiver of the government’s sovereign immunity from suit. The Government consents to be a party to any action brought under Commonwealth law. It cannot be disputed that Plaintiff’s third claim and cause of action brought under Article I, Section 5 of the Commonwealth Constitution is a founded upon a “law of this jurisdiction” within the meaning of 7 CMC § 2251(b). 7 CMC § 2251 does not provide the substantive law structuring such a suit, but there can be no question it waives sovereign immunity from suit.

The extent that the government is liable as a party is answered by the substantive law of the particular cause of action brought against the government. Here that substantive law is provided by Article I, Section 5 of the Commonwealth Constitution, the common law, Restatement of Torts Section 874A, persuasive decisional law from a large number of State courts, and CNMI precedent demonstrating that our Constitution is “self-executing.” *See discussion*, Plaintiff’s Motion at pp. 11-23. These sources of substantive law must be read together as providing the basis for Plaintiff’s third cause of action stated against the Government because the plain language of 7 CMC § 2251 indicates it is meant to be read together some other source of substantive law “of this jurisdiction.” Standing

1 by itself, 7 CMC § 2251 fulfills the similar purposes of (1) waiving sovereign immunity, and (2)
 2 fixing the jurisdiction of this court to hear such suits. Taken with the substantive law of the
 3 Constitution, namely Article I, Section 5, it provides Plaintiff with a cause of action against the
 4 Government.

5 In light of this, once again Plaintiff reminds the Court that the facts are not in dispute.
 6 Defendants Bradshaw and the Government of the Commonwealth of the Northern Mariana Islands
 7 failed to provide Plaintiff with any form of pre- or post-termination hearing. This failure violated
 8 Plaintiff's right to due process guaranteed by Article I, Section 5 of the Commonwealth Constitution.
 9 Accordingly, the government is liable to Plaintiff for damages (the amount of which is as yet
 10 undetermined) in an action brought under Article I, Section 5. The Commonwealth Constitution is
 11 a law of this jurisdiction, and the government has waived sovereign immunity from suit for its
 12 violation. 7 CMC § 2251. The authorities cited by Plaintiff in his opening brief demonstrate that the
 13 Government is substantively liable for damages in such a suit.

14
 15 **VI. THE CLAIM FOR QUANTUM MERUIT IS SETTLED.**

16 Defendants' Response attached a letter to Plaintiff's attorney offering settlement of the Ninth
 17 Claim. That settlement has been effected, and this issue is moot.

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 19 **VII. DEFENDANT BRADSHAW HAS BEEN PROPERLY SERVED, HAS**
 20 **WAIVED OBJECTION TO IMPROPER SERVICE IN ANY EVENT,**
 21 **AND THE OFFICE OF THE ATTORNEY GENERAL HAS ALREADY**
 22 **ENTERED APPEARANCE ON DEFENDANT BRADSHAW'S**
 23 **BEHALF AS HIS ATTORNEY OF RECORD.**

24 Defendants state in three places in their opposition papers that defendant, Robert D.
 25 Bradshaw in his individual capacity is not before the court. The apparent basis for this assertion is
 26 that "Bradshaw has not been served with summons and has not appeared in this case." (Response,
 27 p. 4).

28 This is a bald assertion by Defendants. No evidentiary support, nor any legal authority is

1 cited, and no procedurally adequate means has been utilized to attack jurisdiction or service.

2 This assertion is factually incorrect. Proof of service on Bradshaw was filed on May 6, 1997
3 and again on June 3, 1997. These were provided to defendants' counsel at the special request by
4 letter on August 27, 1999. (Copy attached).


5
6 Even if this was factually correct, any defect in service of process on Bradshaw has been
7 waived, due to the fact that a motion to dismiss under Com.R.Civ.P. 12(b)(6) was brought, on his
8 behalf and no motion pursuant to 12(b)(5) was included in that motion. Accordingly, Bradshaw is
9 now foreclosed from making any challenge of insufficiency of service of process. Com.R.Civ.P.
10 12(g) and (h)(1); and see, Lipofsky v. New York State Workers Camp Board, 861 F.2d 1257, 1258-
11 59 (11th Cir. 1988) (Such defenses are waived when a defendant files a responsive pleading or Rule
12 12 motion failing to assert them.); Madden v. Cleland, 105 F.R.D. 520, 523 (N.C.Ga. 1985) ("The
13 defendants waived any defect in service by filing a motion to dismiss under Federal Rule of Civil
14 Procedure 12(b)(6) without raising the defenses of insufficiency of the form of process or the service
15 of process."); and see 5A Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 1391.
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19 VIII. CONCLUSION

20 For the forgoing reasons, this Court should award and enter partial summary judgment in
21 favor of Plaintiff pursuant to Rule 56, Com.R.Civ.P., on the following issues: (1) that Plaintiff was
22 denied the process that was due to him as a result of the acts of Defendants Bradshaw and the
23 Government of the Commonwealth of the Northern Mariana Islands in terminating him from his
24 employment without providing a meaningful hearing, (2) that Plaintiff was denied the process that
25 was due to him as a result of the acts of Defendants Bradshaw and the Government of the
26 Commonwealth in tarnishing Plaintiff's good name, reputation, honor, and integrity without
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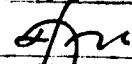
1 providing a meaningful hearing, and (3) that the Government of the Commonwealth of the Northern
2 Mariana Islands is liable in money damages for the deprivations caused to Plaintiff in amounts to
3 be determined at trial.

4 SIGNED this 3rd day of September, 1999.

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6
7 
8 JAY H. SORENSEN
9 Attorney for Plaintiff

10
11 I hereby certify that the foregoing hereof is a full true
12 and correct copy of the original on file in the Office
13 of the Clerk of Courts, Susupe, Saipan, Mariana Islands.

14 Date, OCTOBER 31, 2000

15 
16 CLERK OF COURT
17 NORTHERN MARIANA ISLANDS
18 SAIPAN, MP 96950



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27 EXHIBIT
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